No. 92-1911

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PUD NO. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,
Petitioners,
v.

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY, DEPARTMENT OF FISHERIES
AND DEPARTMENT OF WILDLIFE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

---

BRIEF OF AMICI CURIAE AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN PUBLIC POWER ASSOCIATION, EDISON ELECTRIC INSTITUTE, AND NATIONAL HYDROPOWER ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN R. MOLM
Counsel of Record
WINIFRED D. SIMPSON
JAMES A. LAMBERTH

TROUTMAN SANDERS
Suite 5200, NationsBank Plaza
600 Peachtree Street, N.E.
Atlanta, Georgia 30308-2216
(404) 885-3000
Counsel for Amici Curiae

August 6, 1993

(Additional Counsel Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

JEREMY M. METZ
American Forest & Paper
Association
260 Madison Avenue
New York, N.Y. 10016-2499
(212) 340-0600

ALAN H. RICHARDSON
American Public Power
Association
2301 M Street, N.W.
Washington, D.C. 20037
(202) 467-2904

HENRI D. BARTHOLOMOT
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 508-5622

JONATHAN W. GOTTLIEB
National Hydropower
Association
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 508-4321

QUESTIONS PRESENTED

1. Whether the State of Washington Department of Ecology exceeded its authority under section 401 of the Clean Water Act by requiring minimum stream flows for fish habitat as a condition of a water quality certificate issued for a hydroelectric project subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC").

2. Whether the Federal Power Act's grant of ultimate authority to FERC to establish hydroelectric license conditions (including conditions that are inconsistent with state recommendations), after considering recommendations of state wildlife and other regulatory agencies, restricts a state's authority to require non-water quality related minimum flows at hydroelectric projects pursuant to section 401 of the Clean Water Act.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 92-1911

PUD NO. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,
Petitioners,
v.
STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY, DEPARTMENT OF FISHERIES
AND DEPARTMENT OF WILDLIFE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF AMICI CURIAE AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN PUBLIC POWER ASSOCIATION, EDISON ELECTRIC INSTITUTE, AND NATIONAL HYDROPOWER ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

The American Forest & Paper Association ("AFPA"), American Public Power Association ("APPA"), Edison Electric Institute ("EEI"), and National Hydropower Association ("NHA") submit this brief as *amici curiae*.[1] AFPA is the national trade association of the forest, pulp,

[1] Letters from counsel for Petitioners and Respondents consenting to the filing of this brief by *amici curiae* have been filed with this Court.

paper, paperboard, and wood products industry. APPA and EEI are the national trade associations of the publicly-owned and investor-owned segments of the nation's electric utility industry. Together, APPA and EEI members generate approximately 85% of all electricity in the United States and serve approximately 90% of the nation's ultimate consumers of electricity. NHA is the national association of hydroelectric project owners, builders, equipment suppliers, and consultants.[2]

The issues raised by Petitioners in their Petition for Review involve the interpretation and implementation by the states of section 401 of the Clean Water Act, and the impact of section 401 on the licensing of hydroelectric projects nationwide. Expansion of state regulation of water flows at hydroelectric projects pursuant to the Clean Water Act will have a broad-ranging impact on the members of AFPA, APPA, EEI, and NHA and on the development and continued reliance on hydroelectric generating projects throughout the country. The members of the *amici* associations hold the large majority of the more than 1,000 hydroelectric project licenses issued by FERC for projects located throughout the United States. Water flow conditions are an essential component of these licenses, directly impacting each project's energy production and other benefits created by the project.

Furthermore, the issues in this proceeding have national implications. Altogether, FERC licensed and other federal and non-federal hydropower projects represent a significant part of America's present energy supply—providing nearly 90,000 megawatts of electricity totaling approximately 12% of the United States' electric capacity.[3] Over 150 million consumers in 48 states, including residential,

[2] The particular interest of each association is more fully described in the Appendix (A. 1a-2a).

[3] Edison Electric Inst., *Statistical Yearbook of the Electric Utility Industry/1991*, No. 59, Table 3, p.8 (EEI, Washington, D.C. 1992).

agricultural, commercial and industrial customers, benefit from the power generated by hydroelectric facilities.[4] The long, useful life of hydroelectric facilities and their low operating and maintenance costs place hydroelectric power among the least expensive sources of electricity, a benefit that inures directly to electricity consumers.[5] Hydroelectric generation is a clean, renewable source of energy, the use of which limits the emissions that would otherwise result from the burning of fossil fuels. Additionally, the regulation of water at hydroelectric projects provides recreational opportunities to millions of citizens and benefits to fish and wildlife. Multi-purpose hydroelectric projects also support flood control, navigation, irrigation and domestic water supply.

Under authority granted by Congress to FERC in the Federal Power Act, FERC establishes license conditions for projects pursuant to its national jurisdiction to protect and reconcile competing water use demands, such as fish and wildlife habitat, aesthetics, recreation, water quality, navigation, power plant capacity and energy output. The Federal Power Act requires FERC, in licensing and relicensing hydroelectric projects, to give equal consideration to power and non-power interests that may affect interstate water use concerns. By balancing all of these considerations and tailoring appropriate license terms and conditions, FERC is able to ensure that the public interest, as a whole, is served.

In contrast, state water quality agencies have a substantially narrower perspective. Through an overbroad reading of section 401 of the Clean Water Act, the state water quality agency in this proceeding is seeking to usurp FERC's authority over the licensing process, upsetting FERC's ability to weigh power and non-power

[4] National Hydropower Association, *Hydro Guide: Hydroelectric Resources of the United States*, "Introduction" (NHA, Washington, D.C. 1989).

[5] *Id.*

considerations in crafting workable hydroelectric project licenses.

As the national voices for all sectors of the hydroelectric industry, *amici* are vitally interested in ensuring that federal statutes governing the development of hydroelectric power are consistently interpreted. Such consistent interpretation will allow state and federal agencies to perform their intended roles in implementing those statutes, thereby ensuring FERC's ability to license projects in a way that safeguards the overall public interest and protects the viability of the nation's hydropower resources.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for writ of certiorari for four reasons. First, the state agency in this proceeding exceeded the authority that Congress granted to it under the Clean Water Act. In upholding the flow conditions imposed by the Washington Department of Ecology on the Elkhorn hydroelectric project in Tacoma, the Washington Supreme Court held that section 401 of the Clean Water Act grants the State of Washington the authority to impose non-water quality-based minimum stream flow conditions to protect fish habitat. The Washington Supreme Court's interpretation of the authority granted to the states under section 401 of the Clean Water Act conflicts with the express provisions of that Act. Moreover, the decision below eviscerates provisions of the Federal Power Act in which Congress expressly granted FERC ultimate authority over this issue and is inconsistent with this Court's opinions in *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946) and *California v. FERC*, 495 U.S. 490 (1990), which interpret the scope of FERC's licensing authority in relation to the state regulation of water.

Second, state court decisions that interpret the scope of state authority under section 401 of the Clean Water Act are divided, causing uncertainty and necessitating

guidance from this Court. The Washington Supreme Court's opinion merely adds to a confusing array of divergent opinions that interpret the scope of authority that Congress granted to the states under section 401. These conflicting state court opinions demonstrate the inconsistent application of federal law by various courts and create substantial confusion among the states, for FERC and for the hydroelectric industry.

Third, as a result of FERC's and the federal courts' determination that they are largely unable to review state action under section 401 of the Clean Water Act, the Washington Department of Ecology's action presents a federal question that only this Court can resolve. Because the language of section 401(d) requires FERC to accept water quality certifications issued by states pursuant to section 401, FERC has determined that it lacks authority to review conditions contained in state certifications. Additionally, federal courts have deferred to state courts the issue of the propriety of conditions imposed in water quality certifications issued by states. Therefore, absent a decision from this Court, each state's water quality agency and the courts of each state will remain free to adopt whatever expansive interpretation of that state's 401 certifying authority they deem appropriate.

Fourth, the Washington Supreme Court's decision threatens to seriously disrupt the FERC hydropower licensing process. The practical consequence of the Washington Supreme Court's decision regarding the scope of state authority under section 401 is that individual states may usurp FERC's licensing authority. Under the Washington Supreme Court's interpretation of section 401 of the Clean Water Act, a state may impose flow conditions that severely constrain FERC's ability to establish reasonable license terms and conditions that are designed to address a broader range of factors affecting the public interest. Flow conditions are of primary importance in a federal hydropower license. They affect not only power

production but also project economics, project viability, recreation, navigation, fish and wildlife habitat, and a host of other concerns that FERC, but not a state water quality agency, must consider under the Federal Power Act. A state water resource agency that has no obligation to consider the impact of its decisions on energy production and the other benefits of hydroelectric projects can now decide the fate of hydroelectric projects instead of FERC, the agency to which Congress delegated authority to make those decisions.

Forty-eight states now have federally licensed hydropower projects under FERC jurisdiction. Without guidance from this Court, inconsistent decisions regarding the scope of the states' authority to impose stream flows unrelated to water quality at a hydroelectric project as a condition of a section 401 certification will continue to erode FERC's authority to establish a national energy policy and cause uncertainty and delay in the licensing of hydroelectric projects nationwide.

ARGUMENT

I. THE WASHINGTON SUPREME COURT'S DECISION IMPROPERLY EXPANDS THE AUTHORITY GRANTED THE STATES UNDER SECTION 401 OF THE CLEAN WATER ACT AND THEREBY ESTABLISHES A CONFLICT BETWEEN STATE AND FERC JURISDICTION OVER THE HYDROELECTRIC LICENSING PROCESS THAT ONLY THIS COURT CAN RESOLVE.

A. The Washington Supreme Court's Decision Improperly Expands The Authority Granted The States Under Section 401 Of The Clean Water Act And Is Inconsistent With This Court's Interpretation Of FERC's Jurisdiction Under The Federal Power Act.

Under the Washington Supreme Court's interpretation of section 401 of the Clean Water Act, a state may impose conditions on a FERC license, such as minimum stream flows to protect fish habitat, that directly conflict

with the authority granted FERC under the Federal Power Act. Congress did not intend for section 401 to apply so expansively. Rather, in allowing states to condition water quality certificates pursuant to section 401, Congress provided the states with authority to impose appropriate conditions based on applicable effluent limitations, water quality standards and other provisions specified in section 401(d) as well as state law requirements directly relevant to such factors. The Supreme Court of Washington's interpretation of section 401 significantly exceeds the bounds of this authority and, consequently, upsets the balance of authority that Congress has established between state certification authorities under section 401 and the federal licensing and permitting agencies that require section 401 water quality certificates.

1. *The Washington Department Of Ecology Exceeded The Authority Granted To The States Under The Clean Water Act.*

Rather than repeat the entire argument made by the Petitioners regarding the State of Washington's failure to act within the parameters of the limited authority granted to it under section 401 of the Clean Water Act, the *amici* adopt those arguments by reference. To summarize, the Clean Water Act was enacted to regulate the discharge of pollutants into the nation's waters. In section 401 of the Clean Water Act, Congress provided the Environmental Protection Agency with authority to limit the discharge of pollutants through a permitting process and through the development of effluent guidelines and water quality standards that are applied to determine the specified levels of discharge to be permitted. In addition, pursuant to the Clean Water Act, individual states can assume certain responsibility for developing water quality standards subject to the approval of the EPA. Specifically, section 401 grants states the limited authority to certify that federally-licensed projects will comply with applicable water quality standards and other criteria spec-

ified in the Clean Water Act concerning the discharge of pollutants. Section 401 further provides that states may condition water quality certificates to ensure compliance with these requirements and "other appropriate requirements of state law" concerning activities that may result in the discharge of pollutants. This narrow grant of authority to the states was not intended to override other areas of responsibility not involving the discharge of pollutants that Congress reserved to federal licensing and permitting agencies.

In this case, as a condition in the certificate to PUD No. 1 of Jefferson County and the City of Tacoma ("Tacoma"), the Washington Department of Ecology established month-by-month stream flow requirements for fish habitat that the Department concedes were in excess of those required for water quality. Washington's published water quality standards pertain to such matters as fecal coliform, dissolved oxygen, dissolved gases, and other micro characteristics. By not limiting the section 401 condition to minimum stream flows designed to ensure that the project would comply with these water quality standards and related requirements concerning the discharge of pollutants, the state exceeded the limited authority that Congress granted it under section 401. Accordingly, the state's 401 conditions would substantially diminish, if not eliminate, the diversion of stream flow necessary to make the Elkhorn Project economically viable for the generation of electricity.

2. *The Washington Decision Is Incompatible With Federal Regulation Of Hydropower As Interpreted By This Court.*

In 1920, Congress established the federal licensing program for hydroelectric projects in the Federal Water Power Act, 41 Stat. 1063, later incorporated into the Federal Power Act in 1935, 16 U.S.C. §§ 791a *et seq.* Pursuant to the Federal Power Act, FERC and its predecessor, the Federal Power Commission, have issued regulations that govern the contents of applications for hydroelectric projects and, over time, have made revisions to those regulations as needed. In 1981, largely in response to the National Environmental Policy Act, FERC revised the regulations once more. *See* 46 Fed. Reg. 55926, 55929-30 (1981). Among other things, those regulations require license applicants to prepare the following reports:

Water Use and Quality Report

Fish, Wildlife and Botanical Resources Report

Historic and Archaeological Resources Report

Socio-Economic Impact Report

Recreational Resources Report

As part of the Water Use and Quality Report, license applicants are required to submit a copy of the state's section 401 water quality certificate or a copy of a request for such certification.

In 1986, more than a decade after enacting the Clean Water Act, Congress enacted the Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243 (1986) ("ECPA"), which amended the Federal Power Act and required FERC, pursuant to Section 4(e) of the Federal Power Act, to give "equal consideration" to power and nonpower values including "the protection, mitigation of, damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)." *See* 16 U.S.C. § 797(e). Section 10(j) of the Federal Power Act, which was added by ECPA, reaffirmed FERC as the ultimate decision-maker regarding fish and wildlife-related concerns. *See* 16 U.S.C. § 803(j). While section 10(j) requires FERC to give special deference to recommendations by state and federal fish and wildlife agencies regarding conditions appropriate for fish and wildlife habitat, it allows FERC to depart from recommendations that are

inconsistent with Part I of the Federal Power Act or other applicable law. Thus, pursuant to its authority, FERC independently reviews stream flows and impact on fish habitat. In addition, in the deliberations which FERC undertakes pursuant to section 10(a) of the Federal Power Act, FERC must consider all factors affecting the public interest in the comprehensive development of the waterway. Therefore FERC is required to weigh and balance numerous other factors not considered by state water quality agencies under section 401 of the Clean Water Act, including the effects of a project on fish habitat.

During the debates leading to the enactment of ECPA, the states sought a provision that would have vested in the states the authority to mandate minimum stream flows to protect fisheries. *See Rock Creek Ltd. Partnership*, 38 F.E.R.C. ¶ 61,240 n.8 (1987). After circulating a position paper advocating further amendments to the Federal Power Act that would have granted the states control over the appropriation, diversion, and use of water by licensed projects, and, after a Congressional hearing, Congress declined to grant the states any additional authority to establish minimum stream flows for licensed projects in ECPA. Instead, Congress reaffirmed FERC's exclusive authority to establish minimum stream flows to protect fish habitat by amending the Federal Power Act to include section 10(j). 16 U.S.C. § 803(j).

The conference report confirms that while section 10(j) leaves final decisions to FERC, ECPA did increase the states' role in determining minimum flow requirements by directing FERC to give special deference to the states' fish and wildlife recommendations. *See* H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 21, at 23, 25 (1986), reprinted in 1986 U.S.C.C.A.N. 2537, at 2539, 2541. Increasing the states' authority would have been unnecessary

if Congress had previously granted the states authority pursuant to section 401 of the Clean Water Act to impose minimum stream flows at FERC licensed projects.

Forty-seven years ago, this Court recognized that the exclusive nature of the federal hydroelectric licensing process preempts conflicting state action. In *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946), the Court rejected the State of Iowa's efforts to impose a state permitting requirement on an applicant that was attempting to obtain a hydroelectric license from the Federal Power Commission. The Court concluded that allowing the state to impose a permitting requirement would in effect grant the state veto power over the license and thereby subvert Congress' intention to concentrate comprehensive hydropower planning authority in the Federal Power Commission. *First Iowa*, 328 U.S. at 164.

More recently, this Court considered the State of California's authority to impose minimum flow requirements to protect fisheries in *California v. FERC*, 495 U.S. 490 (1990). In that action, California argued that section 27 of the Federal Power Act, which reserves certain authority regarding proprietary water rights to the states, provided the state with authority to impose mandatory flow requirements for fish and wildlife. This Court rejected this contention and unanimously held that the flow requirements mandated by California were preempted by the federal licensing process. In making this determination, this Court specifically recognized that the addition of section 10(j) to the Federal Power Act reaffirmed "*First Iowa*'s understanding that the Federal Power Act establishes a broad and paramount regulatory role" in the area of fish and wildlife license conditons. *See California v. FERC*, 495 U.S. at 499.

In this proceeding, the Washington Department of Ecology has imposed minimum flow requirements for

the Elkhorn project based upon recommendations made by state fish and wildlife agencies pursuant to statutes unrelated to the state's water quality standards. The Washington Supreme Court upheld the state agency's decision by concluding that the phrase "any other appropriate requirement of State law" in section 401(d) does not refer only to state water quality standards. *Washington Dep't of Ecology v. PUD No. 1*, 121 Wash. 2d 179, 849 P.2d 646, 653 (1993). Specifically, the court found the quoted phrase to be "a congressional authorization to the states to consider all state action related to water quality in imposing conditions on Section 401 certificates." *Id.* In Washington, the very state actions the Washington Supreme Court references would include the establishment of flows to provide for "preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." Wash. Rev. Code § 90.54.020(3)(a) (1991). Because FERC believes that it must accept the terms of the 401 certificate as a part of the license, the inclusion of the conditions in the section 401 water quality certificate makes such conditions mandatory on the Elkhorn project. As a result, the Washington Supreme Court's interpretation of section 401 removes FERC's authority to consider other stream flow recommendations for fish habitat at the Elkhorn project pursuant to section 10(j) of the Federal Power Act and to balance competing uses of the water resource as mandated by section 10(a) of the Federal Power Act.

If the State of Washington had attempted to impose minimum flow requirements or any other conditions on the Elkhorn project under any state statute independent of the Clean Water Act, the state's action would directly conflict with the authority granted to FERC under the Federal Power Act as reaffirmed by this Court in *First Iowa* and *California v. FERC*. It is inconceivable that Congress intended for section 401(d) of the Clean Water

Act to provide the states with the very authority that this Court has found Congress expressly reserved to FERC in ECPA.

B. Only This Court Can Resolve The Conflict Regarding The Scope Of Authority Granted The States Under Section 401 Of The Clean Water Act.

1. *The Washington Decision Is Only One Example Of The Confusion Regarding The Scope Of Authority That Congress Granted The States Under Section 401.*

Although the scope of authority that Congress granted the states under section 401 has been scrutinized by a number of state courts, no clear standards have emerged. Rather, increasingly divergent decisions by state courts have created inconsistent legal standards regarding state authority under section 401. This divergence of opinions threatens the established licensing process and ultimately the development of hydropower.

The courts of various states have issued opinions that broadly interpret the authority that Congress granted the states under section 401. The Vermont Supreme Court, for instance, has determined that section 401 provides the Vermont Department of Environmental Conservation with authority to impose minimum spillage requirements for aesthetic and recreational purposes. *See Georgia Pacific Corp. v. Department of Envtl. Conservation*, No. 91-530 (Vt. Sept. 14, 1992), *petition for cert. filed sub nom, Simpson Paper (Vermont) Co. v. Department of Envtl. Conservation*, 61 U.S.L.W. 3504 (U.S. Dec. 14, 1992) (No 92-1012) (A. 3a-6a). In Oregon, a state appellate court has stated that section 401 grants the state authority to condition certification on compliance with *all* state statutes that have a relationship to water quality. *Arnold*

Irrigation Dist. v. Department of Envtl. Quality, 79 Or. App. 136, 717 P.2d 1274, 1279 (1986). Additionally, the Maine Supreme Court has held that in the section 401 certification process, the Maine Board of Environmental Protection possesses the authority to demand and examine information relating to the effect of the proposed project on fishing, recreation, and fish habitat. *Bangor Hydro-Electric Co. v. Board of Envtl. Protection*, 595 A.2d 438 (Me. 1991).

The courts of other states have interpreted the authority that Congress granted the states under section 401 much more narrowly. In contrast to the Vermont Supreme Court's decision in *Georgia Pacific*, a Connecticut court has determined that the Connecticut Department of Environmental Protection is not authorized to mandate minimum stream flows based on subjective aesthetic impact. *See Summit Hydropower v. Commissioner of Envtl. Protection*, No. CV91-050-26-43, 1992 Conn. Super. LEXIS 2177 (Conn. Super. Ct. July 20, 1992). Moreover, a New York court has decided that the State of New York may not condition its certification of a hydroelectric project on compliance with state laws concerning, among other things, fish and wildlife and recreational opportunities. *See Niagara Mohawk Power Corp. v. New York State Dep't of Envtl. Conservation*, 187 A.D.2d 7, 592 N.Y.S.2d 141 (N.Y. App. Div. 1993). Similarly, a court in Pennsylvania has determined that the Pennsylvania Department of Environmental Resources does not possess authority under section 401 to consider the effect of a proposed project on wetlands and fish migration and to condition certification on compliance with state laws that concern such matters. *Pennsylvania Dep't of Envtl. Resources v. City of Harrisburg*, 133 Pa. Commw. 577, 578 A.2d 563, 567 (1990).

Each new state court decision interpreting state authority under section 401 further complicates the body of law governing the licensing process. These conflicting opinions not only create inconsistent demands on applicants but also constrain FERC's ability to issue hydroelectric licenses pursuant to its statutory obligation under the Federal Power Act to weigh all relevant considerations. A review of the Washington Supreme Court's decision would enable this Court to clarify the scope of state authority under section 401 and end the uncertainty and inefficiency created by conflicting state court decisions.

2. *A Decision From This Court Is Necessary Because FERC Has Determined That It Will Not Contest The Scope Of State 401 Certifications, And Federal Courts Defer To State Courts On This Issue.*

Section 401(d) of the Clean Water Act provides that any water quality certification issued by a state "shall become a condition on any Federal license or permit" that is subject to section 401. Because of this mandatory language, federal courts have prohibited federal agencies from disallowing water quality certification conditions even when the agencies believe such conditions may violate the Act. *See United States Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("FERC may not alter or reject conditions imposed by the States through section 401 certificates."); *see also Roosevelt Campobello Int'l Park Comm'n v. U.S. Envtl. Protection Agency*, 684 F.2d 1041, 1056 (1st Cir. 1982); *Lake Erie Alliance for Protection of Coastal Corridor v. U.S. Army Corps of Engineers*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981), *aff'd*, 707 F.2d 1392 (3d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234 (S.D. Ala. 1976).

Furthermore, FERC has taken the position that it lacks the authority to review conditions contained in state certifications. *See Town of Summersville*, 60 F.E.R.C. ¶ 61,291 at 61,990 (1992) ("[S]ince pursuant to Section 401(d) of the Clean Water Act all of the conditions in the water quality certification must become conditions

in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission."); *Noah Corp.*, 57 F.E.R.C. ¶ 61,170 at 61,601 (1991) ("[W]e recognize that review of the appropriateness of water quality certification conditions is a matter for state courts to decide."); *Central Maine Power Co.*, 52 F.E.R.C. ¶ 61,033 at 61,172 (1990) ("[R]eview of the appropriateness of water quality certification conditions is the purview of the state courts."). Although FERC has expressed its opinion that certain state mandated conditions are beyond the scope of water quality certification under section 401, FERC has maintained the position that it is bound by section 401 to include such inappropriate conditions in the applicant's license. *Central Maine*, 52 F.E.R.C. at 61,172.

Because section 401(d) dictates that a state water quality certification is automatically included in any license issued by FERC, states currently are free to impose minimum flows or other conditions in section 401 certifications, regardless of whether such conditions are in fact water quality "criteria" related. This results in "[a] dual final authority, with a duplicative system of state permits and federal licenses required for each project," that this Court found unworkable in *First Iowa*. *See First Iowa*, 328 U.S. at 169. This Court should therefore grant certiorari and harmonize the authority granted the states under section 401 of the Clean Water Act with the comprehensive authority that Congress granted FERC in the Federal Power Act as amended by ECPA.

II. THE FERC HYDROPOWER LICENSING PROCESS WILL BE EFFECTIVELY PARALYZED AND THE NATION'S HYDROPOWER PROJECTS WILL BE SEVERLY AFFECTED IF STATES ARE ALLOWED TO IMPOSE MINIMUM FLOW CONDITIONS FOR FISH HABITAT AND OTHER NON-WATER QUALITY CONDITIONS THROUGH SECTION 401 CERTIFICATIONS.

The Washington State Department of Ecology and the Washington Supreme Court have interpreted section 401 of the Clean Water Act very expansively. In so doing, they have directly interfered with the FERC hydropower licensing process established by Congress in the Federal Power Act and have impeded the ability of the nation to rely on hydropower as a source of generating capacity in planning for and supplying the country's energy requirements.

The absence of a ruling from this Court will continue to spark disputes over section 401 conditions, causing substantial delays that will increase project licensing costs and render ever more uncertain a project's economic viability. This proceeding is an example of this problem. The license applicants in this case have been forced to appeal the state's section 401 conditions through several levels of administrative and judicial review, taking years and involving substantial costs. This process also places demands on the limited resources of the administrative agencies and the courts. According to FERC's own records, between 1993 and 2010, FERC will be charged with the task of relicensing 416 hydroelectric projects with a total power capacity of 26.202 gigawatts. These figures do not reflect new applications for hydroelectric power projects. Thus, the potential for litigation and administrative delays to resolve section 401 disputes is enormous. Because of the importance of the issues presented by section 401 certifications, such disputes are not uncommon and are likely to continue to arise absent guidance from

this Court. The licensing process already is lengthy and costly—to relicense a project can take six to eight years or more and cost millions of dollars. Disputes arising under section 401 only exacerbate the situation.

If states are allowed to mandate minimum flows for fish habitat (or any other non-water quality conditions) under the guise of the Clean Water Act, without appropiate balancing assessments made by FERC, hydroelectric power and the many benefits it provides to consumers, communities, and the nation will be severely affected. An increase in minimum flows at a hydroelectric project—in this case, for fish habitat—results in lost energy production (as water is spilled through the bypass reach thus avoiding generation) or in the production of energy when it is uneconomic or not needed. In addition, FERC may not be able to issue a license for a particular project at all because under a state's conditions the project would not be viable or able to meet other conditions that FERC considers necessary. In each case, the lost hydropower must be replaced. To replace the lost power, electric suppliers must turn to other forms of production, particularly fossil fuel generation with consequent effects on air quality, cost, diversity of the nation's energy supply, and other interstate interests. Furthermore, increased minimum flows can adversely affect other beneficial uses of the waterway, including recreation and water supply.

By granting the petition for writ of certiorari in this case, the Court will have the opportunity to provide clear guidelines regarding the states' authority under section 401. A current uniform interpretation of section 401 is required to achieve the water quality purposes of the certification process while retaining the careful balance of state and federal authority that is fundamental to a rational and comprehensive program for licensing our nation's hydroelectric power projects.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN R. MOLM
Counsel of Record
WINIFRED D. SIMPSON
JAMES A. LAMBERTH

TROUTMAN SANDERS
Suite 5200, NationsBank Plaza
600 Peachtree Street, N.E.
Atlanta, Georgia 30308-2216
(404) 885-3000
Counsel for Amici Curiae

JEREMY M. METZ
American Forest & Paper Association
260 Madison Avenue
New York, N.Y. 10016-2499
(212) 340-0600

ALAN H. RICHARDSON
American Public Power Association
2301 M Street, N.W.
Washington, D.C. 20037
(202) 467-2904

HENRI D. BARTHOLOMOT
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 508-5622

JONATHAN W. GOTTLIEB
National Hydropower Association
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 508-4321

August 6, 1993

APPENDIX

APPENDIX

THE AMICI

1. *American Forest & Paper Association*

American Forest & Paper Association ("AFPA") is the national trade association of the forest, pulp, paper, paperboard, and wood products industry which, as a group, is the third largest producer of electricity among manufacturers in the United States, and is one of the nation's leaders in the development and use of hydroelectric power. AFPA represents approximately 550 member companies and related trade associations (whose memberships are in the thousands) which grow, harvest and process wood and wood fiber, manufacture pulp, paper and paperboard products from both virgin and recovered fiber, and produce solid wood products. As a single national trade association, AFPA represents an industry that accounts for over 7 percent of the total United States manufacturing output and 90 percent of domestic recycled paper manufacturing capacity.

2. *American Public Power Association*

American Public Power Association ("APPA") is the national organization representing 1,750 of the nation's 2,000 local public power systems. These systems are located in every state except Hawaii and range in size from the largest public power system, the Los Angeles Department of Water and Power with more than 1.3 million customers, to small towns with fewer than 100 customers. Public power systems own approximately 11.9 percent of the total installed electric utility generating capacity in the United States. Hydroelectric projects, with a total installed capacity of 18,426,063 kilowatts, comprise nearly 21 percent of public power's total generation. There are 90 APPA member utilities with hydroelectric capacity. Certain of these utilities, such as the New York Power Authority and the South Carolina Public Service

Authority, market this hyodroelectric power at wholesale to other publicly owned utilities.

3. *Edison Electric Institute*

Edison Electric Institute ("EEI") is the association of the nation's investor-owned electric utility companies.[1] Its members serve 97 percent of the customers of the investor-owned segment of the industry and 73 percent of all consumers of electricity in the United States. EEI's members generate 78 percent of all the electricity in the United States and service 76 percent of the nation's ultimate customers. A large number of EEI's members rely, either directly or through power purchase agreements, upon hydroelectric power to supply their customers' needs and to operate their systems. Over the last eighty years, investor-owned utilities have developed, operated and maintained large numbers of hydroelectric projects, and today operate approximately 366 such projects under licenses issued by the Federal Power Commission or its successor, the Federal Energy Regulatory Commission. These projects serve over 100 million Americans in forty-one states. As the national representative of the single largest group of hydroelectric project licensees, EEI has a vital interest in ensuring that the federal statutes governing the licensing of hydroelectric projects are interpreted consistently and implemented properly.

4. *National Hydropower Association*

National Hydropower Association ("NHA") is the non-profit association established in 1983 to be a national voice for the hydropower industry. NHA has over 100 members from all segments of the hydroelectric industry, including investor-owned utilities, cooperatives, municipalities, private developers, manufacturers, engineers, and legal, financial and consulting firms from all regions of the country.

---

[1] Consumers Power Company, a member of EEI, does not join in this *amici* filing.

VERMONT SUPREME COURT
Supreme Court Docket No. 91-530
MAY TERM, 1992

GEORGIA-PACIFIC CORPORATION
and SIMPSON PAPER (VERMONT) CO., INC.

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
and SIERRA CLUB

Appealed From: Washington Superior Court
Docket No. S473-89 WnCa

ENTRY ORDER

In the above entitled cause the Clerk will enter:

Plaintiffs appeal a Washington Superior Court judgment affirming a decision of the Vermont Department of Environmental Conservation (DEC). They seek to set aside continuous spillage conditions in a § 401 water quality certification, or, alternatively, seek a remand to the DEC for consideration of additional evidence, or a remand to superior court for de novo review. We affirm.

Plaintiffs' contention that the court's denial of their request to remand to the DEC for additional evidence and reconsideration was an abuse of discretion is without merit. A remand to an administrative agency is meant only as a "safety valve" to be used if justice so requires. *In re Maple Tree Place*, 156 Vt. 494, 499 (1991) (quoting *State ex rel. Gunstone v. Washington State Highway*

Commission, 72 Wash. 2d 673, 674, 484 P.2d 784, 735 (1967)). The court found that plaintiffs had the opportunity, which they did not take, to present evidence of their management proposal to the DEC. Further, the court found that the additional proceedings would be a waste of time and expense and would most likely not change the result. These findings are not clearly erroneous and amply support the court's discretionary ruling.

Plaintiffs argue they were entitled to a de novo hearing on the merits in superior court. Plaintiffs, however, waived any opportunity for a de novo hearing with the court, as illustrated by the following exchange at a pending motions hearing:

> The Court: . . . It is your position that this is not a de novo hearing?
>
> Mr. Pearson: My position today is—and if my feet were held to the fire, I don't think it is—but I think on the other hand, an argument could be made that the Rule 75 does not preclude a de novo hearing. It leaves it to other applicable law to decide what the hearing is. I think if we really want to work at it, we could make an argument that in this context a de novo hearing would be appropriate. I've yet to convince Washington counsel and my client one way or the other on that issue. My personal feeling is I think it probably is not a de novo hearing, although, as I say, I think an argument could be made, and I just haven't convinced them to forget about that little argument we could make and get on with the business of just having this heard on the administrative record.
>
> . . . .
>
> The Court: [I]t would appear that the only issue is whether the plaintiff has almost agreed that it's not going to be a de novo hearing. The State agrees that it's not going to be a de novo hearing? Yes.
>
> . . . .

> The Court: Do you [Sierra Club]—is it your position that this is a de novo hearing or is it not?
>
> Mr. Smith: It's the Club's position that this is a review of the administrative record.
>
> The Court: Right. I think maybe we have an agreement.

At no further time was there consideration of whether review would be de novo. The court was never asked to rule, nor did it rule, on the de novo issue raised here.

Plaintiffs also argue for the first time on appeal that denial of a remand to the DEC violated their constitutional rights. These challenges are likewise waived. *In re Quechee Lakes Corp.*, 154 Vt. 543, 552, 580 A.2d 957, 962 (1990).

Plaintiffs lastly contend that the spillage requirement was not suppored by the evidence and that it was beyond the DEC's authority under federal law to consider aesthetic and recreational factors as grounds for a spillage requirement. The Clean Water Act allows the state to impose conditions in a § 401 certification to ensure applicant's compliance with certain criteria, including "any other appropriate requirement of State law." 33 U.S.C. § 1341 (d). Vermont's water quality standards promulgated in accordance with this Act require that the Connecticut River be managed for "water of a quality which consistently exhibits good aesthetic value . . . and recreation." Vermont Water Quality Standards § 3-03. The DEC spillage requirement was amply supported by the evidence. Not only were aesthetics and recreation considered relevant, ease of administration and monitoring were fostered by the requirement. *See in re Sherburne*, 154 Vt. 596, 607, 581 A.2d 274, 280 (1990) (added deference afforded agency determinations in highly technical fields).

Affirmed.

BY THE COURT:

/s/ Frederic W. Allen
FREDERIC W. ALLEN
Chief Justice

/s/ Ernest W. Gibson III
ERNEST W. GIBSON III
Associate Justice

/s/ John A. Dooley
JOHN A. DOOLEY
Associate Justice

/s/ James L. Morse
JAMES L. MORSE
Associate Justice

/s/ Denise R. Johnson
DENISE R. JOHNSON
Associate Justice